IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1780~~ 70-18

PECOLA ANNETTE WRIGHT, *et al.*,
Petitioners,

—v.—

COUNCIL OF THE CITY OF EMPORIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Opinions Below

The majority opinions of the Court of Appeals and the dissenting opinions (Judges Sobeloff and Winter) are reprinted *infra*, pp. 1a-62a and are not yet reported. The judgment of the Court of Appeals is reprinted *infra*, p. 99a.[1]

The order of the district court granting a temporary injunction, as well as the court's Findings of Fact and Conclusions of Law thereon, are not reported and are reprinted *infra*, pp. 80a-85a. The opinion on permanent injunction is reported at 309 F. Supp. 671 and is reprinted *infra*, pp. 63a-79a.

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[1] On April 21, 1971, the Court of Appeals stayed its mandate pending application for certiorari, on the condition that this Petition be filed by May 21, 1971.

A previous district court opinion in this litigation is reported as *Wright* v. *County School Bd. of Greensville County*, 252 F. Supp. 378 (E.D. Va. 1966).

Jurisdiction

The judgment and opinion of the Court of Appeals were entered March 23, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

This litigation was commenced in 1965 to desegregate the public schools of Greensville County, Virginia. The district court in June, 1969 ordered a pairing plan into effect. Thereafter, the City of Emporia—located within Greensville County—sought to operate separate schools for City residents. The City schools would have a substantially greater proportion of white students than either the remaining county schools or the schools of the original combined system. The district court enjoined the operation of separate school systems because it would create a "substantial shift in the racial balance." The Court of Appeals reversed, holding that the "primary" or "predominant purpose" of separation had not been shown to be "to retain as much separation of the races as possible."

1. Did the Court of Appeals err in permitting division of a school district, required by law to desegregate, into separate school systems of substantially differing racial composition?

2. Did the Court of Appeals err in dissolving the district court's injunction against creation of a new school system which the district court found would interfere with its desegregation decree?

3. Did the Court of Appeals err in applying a subjective test of motive to the proposed secession, rather than an objective test of result as required by the decisions in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970?

Constitutional and Statutory Provisions Involved

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following sections of the Virginia Code (statutes related to the operation of school districts and divisions within the Commonwealth of Virginia) are set out in the Appendix, *infra* pp. 86a-98a: §§22-7, -30, -34, -42, -61, -68, -72, -89, -97, -99, -100.1, -100.2, and -100.3.

Statement

This is one of three cases decided together by the Court of Appeals involving the relationship between desegregation and the creation of new school districts. In each instance, a portion of a larger district desegregating under

federal court order or in accordance with the requirements of the Civil Rights Act of 1964, 42 U.S.C. §§2000d *et seq.*, was sought to be detached and operated as a separate school system. In each instance, federal district courts found a significant difference in racial composition between the proposed new districts and the old, found that race was one of the motivating factors for establishing the new district, and enjoined creation of separate school systems. In one case (56a-62a)[2] the Court of Appeals affirmed; in this case and in the third (*United States* v. *Scotland Neck City Bd. of Educ.*, No. 1614, O.T. 1970),[3] the Court of Appeals reversed, on the grounds that the *predominant* motive for carving out the new districts was not "to retain as much of separation of the races as possible."

The background of this litigation is set out in the margin.[4]

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[2] Citations given are to the Appendix to this Petition, *infra*.

[3] That case is already pending before this Court for review upon the petition of the United States. Simultaneously with the filing of this Petition, attorneys for the plaintiffs-intervenors Pattie Black Cotton, et al. are also filing a Petition for Writ of Certiorari in the *Scotland Neck* matter.

[4] This case was commenced March 15, 1965 by parents and Negro students within Greensville County, Virginia. At that time, Emporia had the status, under Virginia law, of a "Town." Its students were educated by the County School Board of Greensville County in buildings owned by that Board. Historically, white students [from the Town and the remaining area of the County] attended only two schools in the system, both of which were physically located within the Town; Negro students [from the Town and the County] attended the various other schools, all but one of which were located outside the Town of Emporia (64a).

In 1966, the district court approved and ordered into effect a "free choice" plan of desegregation., *Wright* v. *County School Bd. of Greensville County*, 252 F. Supp. 378 (E.D. Va. 1966). The district court subsequently found, however, that under this plan some Negro students entered the formerly white schools within Emporia but no white students chose to attend any Negro school. The district court therefore disapproved the continued use of free choice (64a-65a).

On June 17, 1969, following an evidentiary hearing on the County School Board's desegregation plan, the district court announced its intention of approving a pairing plan submitted by plaintiffs, and a written order to that effect was entered June 25, 1969 (65a).[5] On July 7, 1969, the City Council of Emporia addressed a letter to the Greensville County Board of Supervisors and the County School Board, requesting that ownership of the schools within the Emporia corporate limits be transferred to the City, by lease or sale, in order that the City might operate its own school system (Plaintiffs' Trial Exhibit No. 6). The letter stated:

> The pending Federal Court action, at the time of Emporia's transition from a town to a city, was finally decided by the court on June 23, 1969. The resulting order REQUIRES massive relocation of school classes, excessive bussing of students and mixing of students within grade levels with complete disregard of individual scholastic accomplishment or ability.
>
> An in-depth study and analysis of the directed school arrangement reflects a totally unacceptable situation to the Citizens and City Council of the City of Emporia. . . .
>
> IV. [If the City operates a separate school system,] The City will accept on a first come, first serve, no

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In the meantime, the population of the Town of Emporia had increased sufficiently to permit it to become a city of the second class, which it elected to do on July 31, 1967 (80a). As of that time, the City—now an independent political entity—was free to seek to operate its own school system, separate from the County, but Emporia chose not to do so. Instead, it attempted to negotiate an agreement with the Greensville County School Board to operate joint schools (Va. Code Ann. §22-7) and ultimately signed a contract with the County School Board pursuant to which the County agreed to educate city children in the schools it owned in exchange for payment by the City of 34.26% of the cost of operation (80a).

[5] That plan was modified on July 30, 1969 as suggested by the County School Board (65a).

transportation basis, any and all students residing in Greensville County who wish to complete or continue their education in City schools. Out-of-City students will be required to pay a tuition fee, based on present pupil operating cost, less financial aids collectible from the Commonwealth.

July 14, 1969, the City Council met "to take action on the establishment of a City School System, to try and save a school system for the City of Emporia *and Greensville County*" (official minutes of meeting, Plaintiffs' Trial Exhibit No. 12) (emphasis supplied). At that time, the minutes reflect that the Mayor of Emporia stated, "'it's ridiculous to move children from one end of the County to the other end, and one school to another, to satisfy the whims of a chosen few.' He said, 'The City of Emporia and Greensville County are as one, we could work together *to save our school system*.'" (emphasis supplied) (*ibid.*).

The City Council was informed of the percentage of students at each school who would be Negroes under the plan ordered by the district court, and also that the Board of Supervisors had declined to transfer school properties as requested in the July 7 letter, because of the outstanding district court order governing their use. The meeting concluded with the adoption of a resolution instructing the City School Board to take the necessary steps to establish a School Division of the City of Emporia separate and apart from Greensville County (*ibid.*).[6]

[6] The basic Virginia administrative school unit is the "school division," and Va. Code Ann. §22-30 requires the State Board of Education to divide the entire Commonwealth into an "appropriate" number of school divisions of not less than one county or city each. When Emporia achieved city status, it became entitled to have a City School Board elected by its City Council (Va. Code Ann. §22-89) and to purchase the school buildings located within the City, either for an agreed price or at a value established in

Accordingly, the Emporia City School Board met July 17, 1969 and determined to request that the State Board of Education create a new, separate school division for the City alone (Plaintiffs' Trial Exhibit No. 23). A similar request to the State Board was adopted by the City Council on July 23, 1969 (Plaintiffs' Trial Exhibit No. 12). On July 30, 1969, the City School Board authorized registration of pupils even though the State Board had not yet ruled (Plaintiffs' Trial Exhibit No. 23) and on July 31, 1969, registration notices (with the provision for tuition-paying out-of-city students) were mailed (Plaintiffs' Trial Exhibit No. 25).

August 1, 1969, plaintiffs filed a Supplemental Complaint alleging that the Emporia City Council and School Board were taking steps to operate a separate Emporia school system, and would not contribute anticipated funds toward the operation of the Greensville County schools during the 1969-70 school year in the manner directed by the district court's July 30 order. The Supplemental Complaint sought joinder of the additional parties and an order restraining interference with the execution of the court's July 30 decree.

A hearing on temporary injunction was held August 8, 1969. The Mayor of Emporia and the Chairman of the City School Board testified that the immediate motivation behind the move to establish a separate school system was the district court's order desegregating the entire Greensville County school system according to a plan whereby students must attend six schools during their twelve years

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court proceedings. However, it could not operate a separate school system unless it was named a separate school division by the State Board. Initially, Greensville County and the City of Emporia together were designated a single school division by the State Board of Education. See Defendants' Trial Exhibit E-1.

of public education (Transcript of hearing, August 8, 1969, pp. 116, 154, 176). The Mayor also noted that Greensville County white students already were attending a private school in an adjacent county, that the June 25 order had led to increased interest in private schools, and that he believed a separate school system would prevent a mass exodus of Emporia whites to private schools (*Id.* at 116-17, 182).

The district court granted the temporary injunction, ruling from the Bench that racial considerations lay behind the sudden decision to establish a separate school system:

> The Court finds that after this Court's order of June 25, 1969, a meeting of the Council was held, according to the minutes contained in Plaintiffs' Exhibit 12, and the Mayor of the City of Emporia stated to the Council his opinion concerning the plan that had been approved by this Court. Without quoting him it certainly evidenced a disagreement.
>
> The Court finds at that time a member of the School Board reported to Council the percentage of Negroes in each school for the first seven grades. It is apparent that therein was borne [sic] the idea that this [City] School Board [which] had never functioned as a School Board except for purposes of discussing with the School Board of Greensville County the salary of the superintendent and selection, who had never functioned, had been created only because the law required that there be a School Board in the city, they then decided that they would operate a school. . . .
>
> The mere fact that there is a Board that, for all practical purposes, is a moot Board for the city, and there is a county conti[g]uous thereto, the process of desegregation ought not and cannot be thwarted

by drawing a line between Emporia and Greensville County. . . .

In short, gentlemen, I might as well say what I think it is. It is a plan to thwart the integration of schools. This Court is not going to sit idly by and permit it. I am going to look at any further action very, very carefully. I don't mind telling you that I would be much more impressed with the motives of these defendants had I found out they had been attempting to meet with the School Board of Greensville County to discuss the formation of a plan for the past year. I am not impressed when it doesn't happen until they have reported to them the percentage of Negroes that will be in each school.

(Transcript of hearing, August 8, 1969, pp. 204-207. See also the Findings of Fact and Conclusions of Law, *infra* pp. 81a-83a).

Pursuant to the district court's temporary injunction, schools in Emporia and Greensville County opened for 1969-70 in accordance with the court's June 30, 1969 order. On August 19-20, 1969, the State Board of Education tabled Emporia's request for separate school division status "in light of matters pending in the federal court." (Defendants' Trial Exhibit E-I). The City Board hired Dr. H. I. Willett, former school superintendent of Richmond, Virginia, to prepare a proposed budget for the school year 1970-71 (Defendants' Trial Exhibit E-G).

At the hearing on permanent relief held December 18, 1969, the Mayor and the Chairman of the City School Board testified that the City of Emporia desired to offer a "superior" educational program through the device of operating a separate school system; that in their opinion,

the County officials would not allocate the increased expenditures required by desegregation; that City residents would be willing to pay the increased taxes which would be necessitated if the City operated an educational program of the magnitude suggested by Dr. Willett's draft budget. The City also called Dr. Neal Tracey, a professor of school administration, who supported the view that a separate Emporia school system with the programs and expenditure levels proposed by Dr. Willett would be superior in some ways to the educational program then being offered in the County schools. Dr. Tracey agreed with Emporia officials that the Greensville County School budget for 1969-70 ought to have been higher. However, he also recognized educational disadvantages flowing from the operation of separate systems (76a-77a).

Dr. Tracey did not evaluate the proposal from the standpoint of desegregation; he considered the different racial compositions of the two separate systems irrelevant to his analysis:

> No, my basic contention is, and has been, that elimination of the effects of segregation must be an educational solution to the problem and that no particular pattern of mixing has in and of itself, has any desirable effect.

(Transcript of hearing, December 18, 1969, p. 68).

It was undisputed that the racial compositions of the two separate school systems would differ significantly from each other, and as well from the original combined unit. The following table, drawn from the district court's findings, illustrates the change:

TABLE 1—COMPARISON OF STUDENT ENROLLMENTS

	Combined System			City of Emporia			Greensville County		
	Black Students		No. White Students	Black Students		No. White Students	Black Students		No. White Students
	No.	%		No.	%		No.	%	
1968-69	2510	62.7%	1491	—	—	—	—	—	—
1969-70	2477	65.9%	1282	—	—	—	—	—	—
Proposed 1970-71	2404	65.6%	1260	566	51.1%	541	1838	71.8%	719

[Source: pp. 68a, 74a, 75a]

The district court made its injunction permanent (63a-79a). The court concluded that the City's budget did propose a superior educational system, and that defendants were pursuing mixed motives—including racial motives—but that the "establishment of separate systems would plainly cause a *substantial* shift in the racial balance" (emphasis supplied) (74a):

> . . . The two schools in the city, formerly all-white schools, would have about a 50-50 racial makeup, while the formerly all-Negro schools located in the county which, under the city's plan, would constitute the county system, would overall have about three Negro students to each white. As mentioned before, the city anticipates as well that a number of students would return to a city system from private schools. These may be assumed to be white, and such returnees would accentuate the shift in proportions.

The district court concluded that the operation of separate school systems would have serious adverse impact on the provision of plaintiffs' constitutional rights, and therefore enjoined creation of the new unit (78a):

> . . . The inevitable consequence of the withdrawal of the city from the existing system would be a sub-

stantial increase in the proportion of whites in the schools attended by city residents, and a concomitant decrease in the county schools. The county officials, according to testimony which they have permitted to stand unrebutted, do not embrace the court-ordered unitary plan with enthusiasm. If secession occurs now, some 1,888 Negro county residents must look to this system alone for their education, while it may be anticipated that the proportion of whites in county schools may drop as those who can register in private academies. This Court is most concerned about the possible adverse impact of secession on the effort, under Court direction, to provide a unitary system to the entire class of plaintiffs. This is not to say that the division of existing school administration areas, while under desegregation decree, is impermissible. But this Court must withhold approval "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system," *Monroe* v. *Board of Commissioners, supra,* 459. As a court of equity charged with the duty of continuing jurisdiction to the end that there is achieved a successful dismantling of a legally imposed dual system, this Court cannot approve the proposed change.

The majority of the Court of Appeals, apparently concerned that the district court had not sufficiently recognized "the legitimate state interest of providing quality education for the state's children" (3a), articulated a different test:

> If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts

should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative duty to end state supported school segregation. The test is much easier to state than it is to apply.

The majority concluded that the proposed "Emporia city unit would not be an [all-]white island in an otherwise heavily black county" because "[r]egardless of whether the city students attend a separate school system, there will be a substantial majority of black students *in the county system*" (emphasis supplied); thus, "the effect of separation [does] not demonstrate that the primary purpose of the separation was to perpetuate segregation" (5a-6a). Since the district court had made no explicit "finding of discriminatory purpose," and because the school district officials advanced non-racial motives for the creation of a separate district, therefore, the majority of the Court of Appeals held that "the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement" (8a).

The dissenting judges (Sobeloff and Winter, JJ) disagreed with both the formulation and application of the majority's rule:

> [The majority] directs District Courts to weigh and assess the various purposes that may have moved the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units. I find no prece-

dent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. [11a-12a]

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. [12a]

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. . . . Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white. [24a]

. . . I think the advocates of such a subdivision [of an existing district] bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. [27a]

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown*, be "less effective" than the existing "pairing" plan for the county system. [29a]

. . . I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green*, we should adopt the test urged by the government in *Scotland Neck*, i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system. . . . By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well

as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished. [36a]

REASONS FOR GRANTING THE WRIT

I

This Case Presents Federal Constitutional Issues of Critical Significance in the Process of School Desegregation.

This case arises out of the repeated failure of the County School Board of Greensville County to propose an acceptable desegregation plan (64a-65a). Acting pursuant to the mandates of *Brown* v. *Board of Educ.*, 349 U.S. 294 (1955) and subsequent decisions of this Court, the federal district court ordered that all of the County's schools be paired in order to provide a unitary, nonracial education for all students. Immediately thereafter, and without first seeking the permission of the district court, the City of Emporia undertook to establish a separate school system for its residents, which would have had the effect of creating an independent school division of substantially different racial composition from the County unit.

On plaintiffs' motion for injunctive relief, the district court considered Emporia's claims that a separate system would enable it to provide a "quality education" for its students, but concluded that maintenance of the County district structure and implementation of the pairing order would best accomplish the required desegregation. Accordingly, the district court enjoined the secession.

The Court of Appeals severely limited the district court's power to protect its desegregation decree, by confining the authority to prevent carving out of new districts to situations in which "the primary purpose for creating a new school district is to retain as much of separation of the races as possible." The potential impact of the decision upon "implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race," *Swann, supra,* slip op. at pp. 8-9—an impact perceived by the majority below, exemplified by the three cases before the Court of Appeals, and reflected in the increasing number of lawsuits involving similar issues—makes review by this Court particularly appropriate.

Both the majority and dissenting opinions below recognize the "serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race" (3a). This Court has consistently accepted for review cases involving various devices or techniques which had the effect of avoiding full implementation of the *Brown* mandate.[7] This is clearly such a case.[8]

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[7] *E.g., Cooper* v. *Aaron,* 358 U.S. 1 (1958) (direct State interference); *Goss* v. *Board of Educ. of Knoxville,* 373 U.S. 683 (1963) (minority-to-majority transfers); *Griffin* v. *County School Bd. of Prince Edward County,* 377 U.S. 218 (1964) (school closings); *Rogers* v. *Paul,* 382 U.S. 198 (1965) (faculty segregation hindering free choice); *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430 (1968) (free choice plans); *Alexander* v. *Holmes County Bd. of Educ.,* 396 U.S. 19 (1969) (delay); *Northcross* v. *Board of Educ. of Memphis,* 397 U.S. 232 (1970) (exception for large cities); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra* ("neighborhood schools").

[8] The Solicitor General of the United States also views the issue as important. *See* Petition for Writ of Certiorari, *United States* v. *Scotland Neck City Bd. of Educ.,* No. 1614, O.T. 1970.

The circumstances surrounding the movement for separate school districts in the three cases decided by the Court of Appeals suggest an inclination to utilize new school systems to avoid desegregation requirements. The cases are all from contiguous counties,[9] each of which is majority black. Efforts to create separate city school districts were initiated within a very short period of time: March, 1969 (Halifax County), April, 1969 (Warren County), and July, 1969 (Greensville County). Although the Court of Appeals found in only one of the cases that "the primary purpose . . . was to carve out a refuge for white students and preserve to the extent possible segregated schools" (62a), the coincidence of dates and similarity of strategy suggests that this motive was not limited in occurrence, influence or effect to Warren County, North Carolina, alone.

Equally indicative of the gravity of the issue here presented are the numerous similar suits pending in or decided by lower courts.[10]

The rule adopted by the majority below provides, in the context of the federal courts' responsibility for the effective enforcement of the Fourteenth Amendment, that the constitutionality of changes in school district organization and attendance patterns shall depend upon examination of the motives of those supporting the changes. If a district court concludes the primary motive was to preserve as much segregation as possible, it may enjoin formation of

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[9] Warren County, North Carolina abuts Halifax County, North Carolina on the east; a portion of Halifax County is contiguous on the north with Greensville County, Virginia.

[10] *E.g.*, *Burleson* v. *County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970); *Aytch* v. *Mitchell*, Civ. No. PB-70-C-127 (E.D. Ark., Jan. 15, 1971); *Stout* v. *Jefferson County Bd. of Educ.*, 5th Cir. No. 30387; *Lee* and *United States* v. *Calhoun County Bd. of Educ.*, 5th Cir. No. 30154; *Jenkins* v. *Township of Morris School Dist.*, N.J. Supreme Court No. 7777.

a new unit; if, as in this case, the lower court finds both racial and non-racial motivations, it must permit the secession in spite of any disadvantageous effects upon desegregation of the schools.

The majority opinion itself recognizes the difficulty attendant to the application of this standard (3a); the dissenters trenchantly predict it will trap the district courts in a "quagmire of litigation" "to speculate about the interplay and the relative influence of divers motives . . ." (24a). We need not here belabor the point, well made by the Solicitor General to this Court,[11] that so subjective a standard ill serves the goal of attaining equal educational opportunity. It is worth repeating, though, what this Court recently said about the matter: "The measure of any desegregation plan is its effectiveness." *Davis* v. *Board of School Comm'rs of Mobile County*, No. 436, O.T. 1970, slip op. at p. 4.

By focusing upon intent, rather than effect, the standard enunciated below not only departs from this Court's holdings in school desegregation cases (see II below), but also from the general notion that the government must show compelling justification for actions which are based upon or result in racial differences.[12] The Court of Appeals' concern with intent is reminiscent of the time when "good faith," rather than results, was considered sufficient compliance with the State's obligation to desegregate. But,

> The good faith of a school board in acting to desegregate its schools is a necessary concomitant to the

[11] *See* Petition for Writ of Certiorari, *United States* v. *Scotland Neck City Bd. of Educ.*, No. 1614, O.T. 1970.

[12] *E.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Kennedy Park Homes Ass'n, Inc.* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (*per* Mr. Justice Clark), *cert. denied*, No. 1319, O.T. 1970 (April 5, 1971); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1969).

achievement of a unitary school system, but it is not itself the yardstick of effectiveness.

Hall v. *St. Helena Parish School Bd.*, 417 F.2d 801, 807 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969).

These problems are accentuated by the Fourth Circuit's application of the test it proposes,[13] as the dissenting judges cogently argue. For example, the majority minimizes the shift in racial composition effected by the new districting, by comparing only the black student percentages in the *county* system before and after creation of a new district (6a), but fails to observe that the city unit, operating in the schools formerly attended by all the white children in

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[13] Even if the standard were correct, the Court of Appeals should have left its application to the district courts (which are more familiar with the facts and circumstances, and can weigh the credibility and demeanor of witnesses) rather than making its own judgment based on the record of proceedings. *Cf. Keyes* v. *School Dist. No. 1, Denver*, 396 U.S. 1215 (1969) (Mr. Justice Brennan, in Chambers); *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970).

This is particularly relevant in this case. For example, one of the factors relied upon by the majority below was that

> Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole County would require increased expenditures in order to preserve educational quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating city children.

(7a). Compare the finding of the district court (76a):

> . . . The city's evidence, uncontradicted, was to the effect that the board of supervisors, *in their opinion*, would not be willing to provide the necessary funds.
>
> While it is unfortunate that the County chose to take no position on the instant issue, the Court recognizes the City's evidence in this regard to be conclusions; and without in any way impugning the sincerity of the respective witnesses' conclusions, this Court is not willing to accept these conclusions as factual simply because they stand uncontradicted. . . . [emphasis supplied]

the consolidated district, would have a substantially lower percentage of black students (*compare* the district court's opinion, 74a).[14] Furthermore, in this case and in *Scotland Neck*, the majority excluded from consideration the number of white students who could have attended city schools pursuant to the transfer provisions which initially accompanied the plans for separate districts, but it took account of such proposed transfers in concluding that an injunction was proper in the *Warren County* case. Again, in *Warren County* the majority probed deeply into the legislative history of the North Carolina special act creating the Littleton-Lake Gaston district, but in this case relies upon "the unusual nature of the organization of city and county governments in Virginia" (7a) as a justification for Emporia's desire to operate a separate school system without examining the relevant Virginia statutes governing the relationship between Emporia and the County school system (see

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[14] The following table shows the racial composition of the traditionally white schools in the City of Emporia:

TABLE 2—COMPARISON OF STUDENT ENROLLMENTS

	Greensville County High			Emporia Elementary		
	No. Black Students	% Black Students	No. White Students	No. Black Students	% Black Students	No. White Students
1967-68	50	6.5%	719	46	5.1%	857
1968-69	45	5.9%	720	53	6.4%	283
1969-70	424	55.1%	346	665	69.9%	283
Proposed 1970-71*	252	48.2%	271	314	53.8%	270

* The remaining County schools were projected to enroll the following percentages of black students: 73.7%, 68.9%, 76.5%, 72.5%, and 69.4%.

[Sources: 64a, 67a-68a, 74a-75a]

86a-98a).[15] Three judges of the Court of Appeals could find no distinction between the cases to justify the different results reached by the majority.

In sum, the district court measured the new district proposal in the same straightforward fashion as any desegregation plan which might be presented to it,[16] selecting that plan which (adopting this Court's phrasing) achieved "the greatest possible degree of actual desegregation," *Swann, supra*, slip op. at 22. The Court of Appeals reversed the priorities, holding that district courts should not interfere with the carving up of desegregating school systems, even if desegregation is thereby impeded, unless the motive is to maintain the greatest possible degree of *segregation*. That new test seriously jeopardizes continued progress toward school desegregation in every jurisdiction and so compels the granting of review by this Court.

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[15] Where a school division is comprised of a county and a city, the two school boards must meet jointly to select the superintendent. Va. Code Ann. §22-34(87a). When a City contracts with a County for the education of city students, Va. Code Ann. §22-99 (96a) requires that the County School Board shall include city representatives. By agreement, the City and County Boards may operate joint schools, Va. Code Ann. §22-7 (86a) or, with the consent of the two jurisdictions' governing bodies, may establish a single division school board. Va. Code Ann. §§22-100.1 *et seq.* (97a-98a). Thus, Virginia law affords cities several alternatives to operating their own schools.

At the time of the preliminary hearing in this case, two of the four members of the County School Board were residents of the City of Emporia (Transcript of Hearing, August 8, 1969, pp. 182-83).

[16] *Cf. Perkins* v. *Mathews*, 400 U.S. 379 (1971); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

II

The Decision Below Is In Conflict With Rulings Of This Court and The Ruling of Another Court of Appeals.

In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), this Court mandated federal district courts to judge proposed school desegregation plans by their efficacy, and to select that plan which offers to bring about the greatest amount of desegregation unless a school board demonstrates very compelling reasons for preferring another plan:

> Of course, where other, more promising courses of action are open to the board, that may indicate a lack of good faith; and at the least it places a *heavy burden* upon the board to explain its preference for an apparently less effective method.

391 U.S. at 439 (emphasis supplied). Recently, in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970, this Court reemphasized the proposition that the adequacy of a desegregation plan is to be tested by its results.

In this case, the district court correctly performed its *Green* obligation. It rejected Emporia's effort to establish a separate school system because it found such separation would detract from, rather than enhance, desegregation. However, the Court of Appeals held *Green* inapplicable because the new lines proposed were school district lines, rather than school attendance area lines. Instead, the Court of Appeals established a test which places the burden upon the plaintiffs—not the school board, as in *Green*—to demonstrate that the primary motivation of those who seek to operate a separate system is to maintain segregation. Although the district court found that separation would estab-

lish two school systems with substantially differing racial compositions, and would operate only to hinder, not further, the process of desegregation, still the Court of Appeals reversed because there was no finding of primary motivation.

Such a rule is clearly at odds with that stated in *Green* and applied by the district court whose decision was affirmed in *Swann*. See the dissenting opinion of Judge Winter, below, 26a-32a.

The decision below also conflicts directly with that of the Eighth Circuit Court of Appeals, which considered the same issue but reached a contrary result.

In *Burleson* v. *County Bd. of Election Comm'rs of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.), *aff'd per curiam*, 432 F.2d 1356 (8th Cir. 1970), the small, white Hardin area, formerly a separate school district noncontiguous to the Dollarway school district, joined Dollarway in 1949 when its school facilities were destroyed by fire. In 1969 (following the issuance of decrees requiring effective desegregation of the Dollarway district, *see Cato* v. *Parham*, 302 F. Supp. 129 (E.D. Ark. 1969)), petitions were circulated among Hardin residents which sought the reseparation of the area from Dollarway. The Arkansas court enjoined the secession because it concluded that loss of the Hardin area would frustrate, and render increasingly difficult, execution of its own desegregation decrees. Findings with regard to motivation were not made nor were they considered necessary:

> Much of the evidence at the trial was directed at the motive of the proponents of secession. Plaintiffs undertook to prove that the basic motivation was a desire to avoid an integrated school situation; the intervenors undertook to show that integration was not a factor in the equation.

While the Court is satisfied that a desire to escape the impact of the Court's decree was not the sole motive for the circulation of the election petitions and was not the sole factor taken into consideration by Hardin residents who voted for secession, the Court is also convinced and finds that the belief or hope of the Area residents that by seceding from Dollarway they could keep their children out of integrated schools or at least would be able to send them to districts having a smaller Negro population than Dollarway was a powerful selling point for the measure in the Area. . . .

The Court finds from uncontradicted evidence that the secession of the Area would inflict severe damage upon the District financially. . . . . The Court further finds that the secession, if permitted, will substantially increase the racial imbalance in the District's student bodies. . . .

The Area residents do not want to move out of the District; they want to move the District and its problems away from themselves. The Court does not think that they can be permitted to avoid the supposed benefits or escape the supposed burdens of the Dollarway litigation so easily, or that in the existing circumstances a majority of the residents of the Area can deprive other residents of their present right to attend fully integrated schools at Dollarway.

No resident of the Area is required to remain there. No resident of the Area is required to send his children to the District's schools. But at this time the residents of the Area as a class cannot be permitted while remaining where they are to use the State's laws and procedures to take the Area out of the District.

308 F. Supp. at 356-57.

Thus, in *Burleson*, the district court recognized, as did the district court in this case, that motives were mixed; that some residents might favor dissolution for different reasons, including some for racial reasons. The court's major concern was the impact upon its own decrees, which it found would be considerable. The Court of Appeals for the Eighth Circuit affirmed summarily upon the district court's opinion. 432 F.2d 1356.

The *Burleson* decision depends upon and encourages the responsible exercise of a district court's powers. Contrariwise, the opinion below strips the lower courts of their ability to protect their decrees and to effectuate desegregation. On the choice between these conflicting rules may rest the future course of much school desegregation.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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